INDEX

TABLE OF CASES

Text Authorities and Case Notes

Court Decisions

Page

Statutes

Constitution

SUPREME COURT OF THE UNITED STATES

October Term, 1946.

J. K. DUNSCOMBE,
Petitioner,
vs.
SCOTT M. LOFTIN, as Trustee, et als.,
Respondents.
No. 224.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

There are two opinions. The District Court filed its order (Tr. 30) and a Memorandum (Tr. 31 and 32) which has not been printed in the Federal Reporter series. The opinion of the Circuit Court of Appeals (Tr. 89-97) was rendered April 12, 1946, and is reported in 154 F. (2d) 963.

JURISDICTION.

The judgment, Circuit Court of Appeals, was entered April 12, 1946 (Tr. 97-98), and its order denying petition for rehearing was entered May 11, 1946 (Tr. 102). The petition for writ of certiorari was docketed June 22, 1946. On page 7 of the petition for writ of certiorari petitioner states:

> "Jurisdiction to review a judgment of the Circuit Court of appeals is vested in this court under Title 11, Section 347 (c) . . . "

but the citation is erroneous and was evidently intended for Title 28, Section 347 (a), U. S. Code 1941.

STATEMENT OF THE CASE.

We cannot agree with petitioner's Statement of Matters Involved, on pages 2 to 7 of the petition for certiorari, nor with her other statements of the case at other places in her petition and in her brief. Solely for brevity we refer to and adopt as a correct statement of the case the opinion of the Circuit Court of Appeals (Tr. 89-97 and 154 F. (2d) 963). Hereafter in this brief we shall occasionally restate some of the facts to correct erroneous or inadequate summary of them made in the petition for certiorari and brief in support thereof.

ASSIGNMENTS OF ERROR.

The brief in support of petition for writ of certiorari does not contain any assignments of error, but hereinafter in replying to the petition and brief we will argue the "Questions Presented" by petitioner as stated in her petition and brief.

THE ERRORS IN AND INSUFFICIENCY OF THE PETITION FOR CERTIORARI AND THE SUPPORTING BRIEF.

Counsel for respondent Trustees of the property of Florida East Coast Railway Company, Debtor, assert that the petition for certiorari should be dismissed, not only because it fails to state proper grounds for relief but because it fails to comply with the requirements of Rule 38, par. 2, of Revised Rules of this Court, and petitioner's supporting brief violates Rule 27, par. 1 (c), (d), (e) and (f) of the Revised Rules. The "Statement of Matters Involved" and the "Basis of Jurisdiction" in the petition for certiorari contain numerous errors and omissions in summarizing the record, as well as vague and frequently inaccurate summaries or references to law and statutes. The "Questions Involved" and the "Reasons for Granting the Writ" in the petition repeat some of the erroneous statements of fact and add new errors in statements of law in summarizing decisions and statutes, and even citations to statutes. Petitioner's supporting brief does

not conform in many particulars to Rule 27 of the Revised Rules of this Court. We shall discuss these errors and insufficiencies as they appear in order in the petition and brief.

A. REPLY TO "STATEMENT OF MATTERS INVOLVED" IN THE PETITION.

The "Statement of Matters Involved" in the petition for certiorari is a rambling and vague tale of wrongs sustained by the petitioner, J. K. Dunscombe, in her journey through the Courts below. Tested by the actual record and established law little remains other than smooth worn words and phrases, wholly insufficient to warrant any relief. Technically speaking the Debtor has not been a "bankrupt railroad" against which the District Court refused to relax its fifteen year stay of suits.

General Receivers in Equity were appointed for the property of the Debtor on August 31, 1931, on the suit of a common creditor, by the District Court (see opinion in *Findlay v. F.E.C. Ry. Co.*, 68 F. (2d) 540), and in the same order suits were stayed and all creditors required to present their claims within six months (Tr. 69), later extended to March 1, 1932 (Tr. 71, and opinion Circuit Court below, Tr. 92-93). On February 1, 1941 a creditor of the Debtor successfully commenced reorganization proceedings under Section 77 of the Bankruptcy Act (opinions in *F.E.C. Ry. Co. Trustees' Eq. Trust Certfs.* Finance Docket 13485, Vol. 249 I.C.C. 361, and *Peavy-Wilson Lumber Co., Inc. v. Loftin, et al.*, 131 F. (2d) 579). Parenthetically, the order approving petition in the reorganization proceeding and appointing temporary Receivers did stay suits, but an order of June 6, 1941, in the reorganization proceedings, did limit to October 1, 1941 the time for filing claims (Tr. 43-47). The petitioner, J. K. Dunscombe failed to file claims in either the Receivership Proceedings or the Reorganization Proceedings within the times fixed by the orders therein (Tr. 93), and "She then waited 15 years for dissolution of the stay order" (Pet. for Cert. 4). Nowhere in the record herein has petitioner shown that she was not bound by the order (Tr. 70) fixing March 1,

1932 as limit for filing claims in the Receivership Proceedings, and the order (Tr. 43) entered in the Reorganization Proceedings fixing October 1, 1941 as limit for filing claims. There is a general allegation in the second paragraph of the petition for leave to sue (Tr. 1) that petitioner is not barred by the passage of time. But petitioner has been under no disability since the commencement of the Receivership proceedings. The stay orders in the Receivership and Reorganization Proceedings did not prevent her from filing her claim in either proceeding, as required by the orders in each proceeding fixing the time for filing claims therein. In each proceeding, Receivership as well as Reorganization, the District Court had exclusive jurisdiction of all of the Railway Company's property. The validity and binding effect of orders fixing time for filing claims in general receiverships of railroads has been established for over fifty years. See *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 672, and *Oklahoma v. Texas*, 266 U. S. 298, 69 L. Ed. 296. Section 77 of the National Bankruptcy Act, as amended, has been repeatedly held valid, and in *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478, 84 L. Ed. 876, "A court of bankruptcy has an exclusive and non-delegable control over the administration of an estate in its possession." See also Section 205, Title 11, U. S. Code 1941 "*The Court . . . shall . . . have exclusive jurisdiction of the debtor and its property*", and see Section 205 (c) (7) and (8) of Title 11 as to fixing time for filing claims. The nearest to an excuse or reason for petitioner waiting for fifteen years to assert her claim is her contention to the effect that her claim, being one for value of land taken by a Florida corporation having the power of eminent domain, could never be barred under the Federal and Florida Constitutions. Such is not the law either of Florida or, as announced by this Court, in respect to the Federal Constitution. The Supreme Court of Florida has expressly held that a claim for compensation for land taken for public purposes can be "lost or abandoned", and has also held a corporation having the power of eminent domain can nevertheless acquire title by adverse possession. See *Hillsborough County v. Kensett*, 107 Fla. 237, 144 So. 393, and *S.A.L. Ry. v. A.C.L.R.R. Co.*, 117 Fla. 810, 158 So. 459.

These two decisions are in accordance with the weight of authority, and only two states support the contrary rule asserted by petitioner. See *Vol. 2, Nichols on Eminent Domain (2nd Edition)* Section 344, pp. 959-960; *Lewis on Eminent Domain (Third Edition)*, Vol. 2, page 1714. This Court, as early as 1898, held that:

> "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute."
>
> *Pierce v. Somerset Railway*, 171 U. S. 641, 43 L. Ed. 316.

The excuse or reason asigned by petitioner for waiting fifteen years and not filing or presenting her claim within the times respectively limited in the Receivership and in the Reorganization proceedings is wholly without merit and was so held both by the District Court and the Circuit Court of Appeals in their respective opinions herein (Tr. 31 and 89-97).

A correct summary of petitioner's claim, as stated in her petition for leave to sue (and not as attempted to be amended or elaborated in the petition for certiorari), appears in the first three paragraphs of the opinion of the Circuit Court of Appeals (Tr. 89-91). This opinion now also appears in 154 F. (2d) 963.

The petition for leave to sue did not pray that petitioner be permitted to "enforce her vendor's lien in the State Circuit Court for Martin County, Florida" (Pet. for Cert. p. 3). To the contrary, "Petitioner prays that the Court allow and direct said claim to be adjudicated in such Court of competent jurisdiction as it may appear most appropriate." (Tr. 2).

At the foot of page 3 of the petition for certiorari petitioner places in quotations the following matter as being included in the final decree of partition of December 17, 1901:

> "that the Railway was entitled to land it then had its single track upon and used for the operation of the railroad."

This quotation is erroneous. Nowhere in the final decree in the partition suit did the court use the expression "single track". Although the Florida East Coast Railway right of way was casually mentioned several times in such final decree, the main paragraph of the 1901 decree relating to the Florida East Coast Railway is exactly as quoted in the Report of the Trustees and shown on page 14 of the transcript. In the December 17, 1901 final decree in the partition suit of Annabelle Robinson of 1891-1901, and as found by the District Court below, the Railway was decreed to be "entitled to its right of way . . . to the extent in width as the same is now" (then) "used, occupied, laid out, surveyed, and operated" through the Myles or Hanson Grant (Tr. 14). As found by the Circuit Court of Appeals: "It appears from the report of the commissioners, their plat of the lands, and the partition decree of December 17, 1901, that not only did the railroad run over the right of way in question but the commissioners in allotting lands to the predecessors in title of Plaintiff made the railroad right of way a boundary line of lots 2 and 3. The commissioners did not allot the lands within the right of way to Plaintiff's predecessors in title, but on the contrary recognized the rights of the Railway therein, as did the Court in its final decree . . ." (Tr. 94-95). In other words, the very instruments referred to in the petition for leave to sue contradicted petitioner's claim of title and lien. The Circuit Court of Appeals so expressly held in the next to last paragraph of its opinion (Tr. 97).

At pages 3 and 4 of the petition for certiorari an attempt is made to construe the partition commissioners' report, their plat of 1901, and the Land Company's plat of 1913, each as not plainly recognizing the Railway Company's 100-foot right of way. However, this report and these two plats, copies of which were attached by petitioner to her petition for leave to sue (Tr. 9-10), speak for themselves.

We believe that this Court will construe them against the Petitioner, as did the two courts below.

The District Court (Tr. 31) expressly found from the evidence that "Since 1915 or earlier, its" (Debtor's) "possession of a 100-foot right-of-way has been evidenced on the ground by the presence of telephone and telegraph poles and right-of-way monument posts along the easterly and westerly sides of the 100-foot right-of-way." Both Courts held that the Land Company was out of possession in 1922 and its deed of that year to petitioner's husband was void under the Florida law (Tr. 31 and 96). The Circuit Court of Appeals also expressly found from the partition suit papers referred to in the petition for leave to sue that the Land Company "having obtained no title to the right of way" (by the partition decree) "could convey none to the husband of Appellant" (Tr. 96). These findings, supported by the portion of the record made by the petitioner, sufficiently refute the contentions of her title and want of notice of the Railway's claim of title made on pages 4 and 7 of the petition for certiorari.

Whatever may have been the uncommunicated understanding of petitioner and her counsel as to what would or could be determined at the Jacksonville hearing (Pet. for Cert. p. 5), there is nothing in the record to support any contention that the District Court would and did not fully hear on the merits the petition for leave to sue. "The Court, after due notice, having heard the evidence of the parties, and the argument of their counsel . . . said petition for leave to sue is denied." (Tr. 30). The Memorandum of the District Court (Tr. 31) shows conclusively that the hearing was on the merits. As shown hereinabove, the District Court had and was required by Section 77 of the Bankruptcy Act (Sec. 205a Title 11, U. S. Code) to exercise "exclusive jurisdiction of the debtor's property".

In our brief for the respondent Railway Trustees before the Circuit Court of Appeals, we stated—and we now state again:

> "Counsel for the Trustees believe that counsel for Petitioner will not deny that at the same hearing the judge of the Court below not only asked counsel for Petitioner whether he had anything to offer, but whether counsel for Petitioner denied the existence of the eighteen right-of-way monuments. At the hearing counsel for Petitioner did not, in fact, offer any evidence other than the exhibits attached to his proposed Bill, and in respect to the right-of-way monuments only suggested to the Court that they were small and might not constitute notice of claim, and might not actually be seen by any intending purchasers of lands in the Hanson Grant. No complaint was made in the petition for rehearing (Tr. 32-36) either as to the exhibits considered by the Court below, or as to any want of opportunity to offer testimony or evidence. Other than the general claim —(that the procedure of the Court below did not afford Petitioner due process of law)—in the First Point of 'Appellant's Statement of Points' (Tr. 39-40) there is nothing in the record showing any objections of Petitioner to any of the evidence considered by the Court below, nor any showing of lack of opportunity given Petitioner or that Petitioner desired to introduce other or further evidence."

At the argument before the Circuit Court of Appeals respondents stated, without contradiction from petitioner, that at the hearing by the District Court (a) all parties understood that it was on the merits; (b) that the District Judge stated he would consider the case just as if he were hearing the same in open court in the main court room; and (c) that the District Judge asked the petitioner's counsel if he had any other testimony or evidence he desired to produce, and petitioner's counsel, with the exception of his comment regarding the size of the monuments as above stated, did not directly or indirectly object to the procedure of the District Court or suggest to the Court that he had any other testimony or evidence to submit, or even that he needed time to attempt to procure the same. The Memorandum of the District Court (Tr. 31) clearly shows that the Court not only determined from the face of the petition that no meritorious claim was presented, but also went further and reached the same conclusion from the evidence submitted at the hearing. Labelling the hearing by the

District Court a "summary proceeding" does not make it one. The record shows otherwise (Tr. 30). The petition for rehearing in the District Court (Tr. 32-36) did not complain or assert that the hearing was a summary one—that assertion was first made in the "Second Point" of Appellant's Statement of Points (Tr. 39-40), but, as shown, is wholly unsupported by the record.

As we interpret them, the second and third paragraphs of page 5 of the petition for certiorari are chiefly complaints that the Trustees performed their plain duty by advising the District Court as to points of law, the facts involved, and producing the evidence to prove them at a hearing by the District Court of a claim for an equitable lien against the property of the Debtor which was then "in the exclusive jurisdiction" of the District Court.

The District Court held that petitioner "has no enforceable cause of action against Florida East Coast Railway or its Trustees (Order, Tr. 30). Its reasons in its Memorandum (Tr. 31-32) were not so limited as summarized at pages 5 and 6 of the petition for certiorari. The District Court held:

(a) That the final decree in 1901 in the partition suit determined that the Railway had a right of way to the extent in width as then occupied, laid out and surveyed;

(b) That since 1915, or earlier, the width as used was 100 feet;

(c) That petitioner's predecessor in title was not in possession in 1922 when petitioner obtained a deed;

(d) That petitioner took title with actual notice of the Railway's possession and claim of title;

(e) That the Railway acquired title by adverse possession in addition to title obtained in the 1901 partition final decree; and

(f) That petitioner's claims were barred by laches, and petitioner's claims were barred by the orders fixing time for filing claims in the receivership and reorganization proceedings.

It will be noted that any one of the six grounds for judgment is fatal to petitioner's claims. The Circuit Court of Appeals (opinion, Tr. 89) recognized each of these six grounds and also held that the petition for leave to sue and exhibits to same in themselves showed "Plaintiff's case was without merit."

The last paragraph on page 7 of the Statement of Matters Involved is especially replete with errors of fact and law. The District Court did have "exclusive non-delegable jurisdiction" of the Debtor's property and all claims against the same asserted therein. The hearing by the District Court was not "summary". A corporation having the power of eminent domain can, in Florida, acquire land by adverse possession. There was nothing indefinite about the orders in the Receivership and Reorganization proceedings requiring claims to be filed, and the Railway Company, its Receivers, and later Trustees, were under no moral, much less legal, duty to notify petitioner of any disaffirmance of holding the land (as asserted by petitioner), because title thereto had been lawfully fully acquired by the Railway Company under the partition decree of 1901 and subsequent actual user and possession of the full 100-foot right of way long prior to 1922 when petitioner acquired title to the abutting lands only. (Tr. 94-96).

B. REPLY TO "BASIS OF JURISDICTION" IN THE PETITION.

While respondents concede the jurisdiction of this Court to grant a writ of certiorari as prayed, respondents contend that it should not be granted for the many reasons stated elsewhere in this brief. The statutes cited by petitioner are either erroneously cited or are inapplicable. Section

347 (a), Title 28, U. S. Code 1941, is the correct citation. Section 377, Title 28, U. S. Code (cited by petitioner as "Section 262 of the Judicial Code") is not applicable because of the plain provisions of Section 347 (a) and the prohibitions in Section 347 (c), each of Title 28, U. S. Code. Petitioner's Basis of Jurisdiction is further defective in its failure to state "the date of the judgment or decree sought to be reviewed and the date upon which the application for appeal" (certiorari) "is presented" as is plainly required by the reference in Rule 38, par. 2 to Rule 12, par. 1. The missing dates are:

February 22, 1945, order of District Court denying petition for leave to sue. (Tr. 30).

March 16, 1945, order of District Court denying petition for rehearing. (Tr. 37).

April 12, 1946, judgment of Circuit Court of Appeals affirming District Court (Tr. 97).

May 11, 1946, order denying rehearing (Tr. 102).

June 22, 1946, date of filing petition for certiorari.

We are unable to agree with petitioner that the District Court and Circuit Court of Appeal did not have jurisdiction to determine questions of fact presented on petitioner's claims, or that the Circuit Court of Martin County had exclusive jurisdiction. The District Court had "exclusive and non-delegable control" and jurisdiction of the Debtor's property, of all persons asserting claims to the same in the Reorganization Proceedings, and of the claims so asserted. *Thompson v. Magnolia Petroleum Co.* (supra) and Sec. 205a, 205c (7), 205c (8), Title 11, U. S. Code 1941. For the reasons hereinabove stated, there was no lack of due process of law in the District Court and Circuit Court of Appeals in disposition of petitioner's claim. Nor are we able to agree that "the questions of fact . . . were whether the land conveyed by the Land Company in 1921 was in adverse possession

of the railroad at that time." There were many other questions of fact and of law presented to and decided by the District Court and Circuit Court of Appeals. See their respective opinions (Tr. 31-32 and 89-97).

C. DISCUSSION OF "QUESTIONS PRESENTED" IN THE PETITION.

While we will not at this point argue at any length the petitioner's six questions presented, we do feel that we should point out certain erroneous assumptions of fact or of law in the first four of these questions.

First Question

> "Can the district federal court dispose of a contested claim by a summary proceeding in bankruptcy, on an application for leave to sue the bankrupt?"

As we have hereinabove shown, the proceedings in the District Court were not summary, but even if the proceedings were summary the action of the District Court was entirely proper, as shown by our argument of this question hereinafter made.

Second Question

> "Can the federal district court claim that because a Florida corporation is adjudged a bankrupt that extends the jurisdiction of the federal court to hear and determine matters of law and fact that are in the sole jurisdiction of the State Court?"

The petition for leave to sue did not pray for leave to sue in the *State Court.* (Tr. 2). Nor did the State Court have any jurisdiction of the property of the Debtor or of liens claimed against the same. Section 205 (a), Title 11, U. S. Code 1941.

Third Question

> "Can a federal court construe leave to foreclose a vendor's lien as an application to sue in ejectment and can the equitable rule of laches be applied when on the face of the action the statute of limitations has not run against the claim and under the law of Florida injury from laches are questions of fact to be proven?"

There are actually three unrelated questions in this third question, and each of them contains unwarranted assumptions of fact or law. The Order and Memorandum (Tr. 30-32) of the District Court can not be fairly read as construing the petition for leave to sue as an application to sue in ejectment. Under the law of Florida and most other states, the doctrine of laches is not fast bound to statutes of limitation. The Florida law does permit the doctrine of laches to be applied when apparent upon the face of the complaint or petition. See 7th and 8th headnotes in *Norton v. Jones*, 83 Fla. 81, 90 So. 854, and see also *Wilkins v. Groves*, 155 Fla. 279, 19 So. 2d 834, holding a bill did not show laches on its face.

Fourth Question

> "If the District Court was wrong in assuming jurisdiction and in its judgments, was the Circuit Court of Appeals in error in not only affirming the lower court but also making added findings of fact for which there was no basis in the record?"

Here again there is more than one question. Under Section 205a, Title 11, U. S. Code 1941, as construed by this Court in *Thompson v. Magnolia Petroleum Co.* (supra), the District Court sitting in bankruptcy in reorganization proceedings of the Debtor, had "an exclusive and non-delegable control over the administration of" the "estate in its possession." The District Court could not have been wrong in assuming jurisdiction; it could have been, but was not, wrong in its judgments (Tr. 30, 31) denying the petition for leave to sue and a rehearing. For the same reasons the Circuit Court

of Appeals was not wrong in affirming. Moreover, the affirmance was properly based upon the part of the record made by petitioner, so that any incidental findings of fact from other parts of the record were harmless even if erroneous. But such findings of fact were not erroneous as the opinion of the Circuit Court of Appeals so clearly shows.

Fifth Question

> "If the Federal and State Constitutions forbid taking private property for public use without payment, can one with the right of eminent domain proceed by indirection and acquire such property by any other method?"

Sixth Question

> "Was the respondent guilty of padding the record on appeal?"

The correct answer to the fifth question is yes and to the sixth no.

D. REPLY TO "STATEMENT OF EVIDENCE" IN THE PETITION.

Both sentences under this heading of the petition for certiorari are incorrect. There were attached by petitioner to her petition for leave to sue (a) copy of map of the Commissioners in the partition suit culminating in the final decree of December 17, 1901 (Tr. 9); (b) copy of the Land Company's plat of 1913 (Tr. 10); and (c) the proposed Bill to Foreclose Lien (Tr. 3-8) which referred at length to the 1901 partition suit in the same District Court. The Bill to Foreclose Lien, the two maps and the partition suit reports, map and decree were all used as evidence by both the District Court and the Circuit Court of Appeals, and properly so. As a matter of fact, a purported copy of the 1901 final decree of partition was also attached by petitioner to her petition for leave to sue. "Photostatic copy of decree of Dec. 17, 1901, is elsewhere in this Record." (Tr. 8). Based upon

these papers alone—that is, petitioner's papers— the District Court and the Circuit Court of Appeals properly held that petitioner had not shown a prima facie case for any relief.

Hereinabove we have quoted at length from brief of respondent Trustees, as appellees in the Circuit Court of Appeals, as to what occurred at the hearing in the District Court. This has never been answered nor expressly denied by petitioner. Her statement in her petition for certiorari of "The petitioner was never given an opportunity to offer any" evidence is flatly contradicted by the recitals in the District Court's order denying her petition for leave to sue—"The Court, after due notice, having heard the evidence of the parties" (Tr. 30).

E. REPLY TO "REASONS RELIED UPON FOR WRIT OF CERTIORARI" IN THE PETITION.

I.

We have examined the nine decisions of this Court and of the twelve Circuit Courts of Appeal cited under this heading, and can only answer in the generality of petitioner. These cases do not set up any rules of law which were violated by the District Court and the Circuit Court of Appeals herein. We utterly fail to see the materiality of the *claim here first asserted* that petitioner was denied *"her right to a jury trial."* This is mere sophistry, as the petition for leave to sue was for permission to file and maintain in an appropriate competent court a "Bill to Foreclose Lien" (Tr. 2 and 3 and Pet. for Cert. p. 3). Foreclosure of liens in Florida is in chancery and there are no jury trials in chancery courts in Florida.

The notice in 1931 to creditors, pursuant to order fixing time for filing claims (Tr. 69, 70-72), in the Receivership proceedings, the Notice to Creditors in 1941, pursuant to order fixing time for filing claims in the Reorganization Proceedings (Tr. 43 and 48), and the hearing and disposition

by the District Court of the petition for leave to sue, filed long after time for filing claims in both the Receivership and the Reorganization proceedings had expired, were all in accordance with due process of law as defined by this Court:

> "Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it."
>
> *Dohany v. Rogers*, 281 U. S. 362, text 369, 74 L. Ed. 904, text 912.

Northern Pacific R. Co. v. Concannon, 239 U. S. 382, 60 L. Ed. 342, holds that a particular railroad right of way granted by Acts of Congress cannot be lost to the carrier by adverse occupancy and possession by private individuals. There is no intimation in the opinion that the converse is true, and the Court had no occasion to, and did not, hold that a railway cannot acquire a right of way by adverse possession.

The case of *In re Macklem*, U. S. District Court, D. Maryland, 28 F. (2d) 417, does hold as stated by petitioner, but it was in a bankruptcy of an individual (a wife's dower in real estate of the bankrupt being also involved), and the rule therein stated is utterly inapplicable to railroad reorganization proceedings in view of the provisions of Section 205a, Title 11, U. S. Code 1941:

> "the court . . . shall during the pendency of the proceedings under this section and for the purposes hereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal Court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

See also Sections 205 (c) (7) and 205 (c) (8), of Title 11, U. S. Code 1941 and *Thompson v. Magnolia Petroleum*

Company (supra). Ever since the 1895 decision of *White v. Ewing*, 159 U. S. 36, 40 L. Ed. 67, it has been established that possession of the *res* by the Court of chancery through its receivers gives it exclusive jurisdiction to hear and determine all controversies affecting title, liens upon, possession and control of the property, although for convenience the court may allow an issue to be tried elsewhere.

Hill v. Gordon (Cir. Ct. N. D. Fla. 1891), 45 Fed. 276, did hold that a delay of twenty years in proceedings to enforce a judgment does not constitute laches on the part of the judgment holder where there are prior judgments that were liens on the land for more than its value, some of which a purchaser of the land had bought and was holding against it. As to application of laches the Court stated in its opinion:

> "The question of laches must be determined to a great extent upon the facts of each case."

The facts in the *Hill* case (supra) are quite different from those shown in the record herein. Here the record shows unexplained long failure of petitioner to file her claim within the time limited in a 1931 order in Receivership proceedings and in a 1941 order in Reorganization proceedings. Incidentally, laches under the Florida decisions is not a question of fact to be proved—it may also be shown by the pleadings of the party charged, nor is actual injury by the alleged laches a requisite in Florida—embarrassment or inconvenience is sufficient. 7th and 8th headnotes *Norton v. Jones*, 83 Fla. 81; 90 So. 854.

II.

Most of the eleven Florida Supreme Court decisions cited under this heading do expressly discuss or construe the various provisions of the Florida Constitution referred to or summarized by petitioner. The most pertinent one of the eleven is *Hillsborough County v. Kensett*, 107 Fla. 237, 144 So. 393, which is directly contrary to the chief contentions of petitioner. In the *Hillsborough County* case (supra), which was an action to foreclose an equitable lien upon prop-

erty taken by the County which had not used its eminent domain power, the Court said:

> "Property unlawfully taken without compensation is not public property until it is paid for, or until the right to recover compensation for it *is lost or abandoned*, even though it has been devoted to the county benefit and is being used in the orderly administration of county government, such as for purposes of a highway and the like."

Cone Brothers v. Moore, 141 Fla. 420, 193 So. 288, cites with approval *Norton v. Jones*, 83 Fla. 81, 90 So. 854, in which earlier case the Court affirmed a dismissal of a bill showing laches on its face. In a later case of *Wilkins v. Groves*, 155 Fla. 279, 19 So. 2d 834, the Supreme Court of Florida upheld a bill as against motion to dismiss because it did not show laches on its face.

Sarasota v. Dixon, 146 Fla. 369, 1 So. 2d 198, does hold exactly as summarized by petitioner, but it does not help petitioner. Here we do not have any question of possession or right of possession of land as was involved in that case. As frequently stated by petitioner, the Florida court decisions only permit foreclosure by the former owner of a lien for the value of property taken by a public corporation failing or omitting to exercise its power of eminent domain (Pet. for Cert. p. 2). See also *Florida Sou. R. Co. v. Hill*, 40 Fla. 1, 23 So. 566, and *Hillsborough County v. Kensett*, 107 Fla. 237, 144 So. 393. Conceding, *arguendo*, that the Debtor in 1925 tortiously entered into possession of property then owned by petitioner (which are not the facts as found by both lower Courts), the petitioner under Florida law then and there lost her possession and right of possession of the land, so that she had none to further lose by laches. Here the laches consist of unexplained omission for fifteen years by petitioner to file her claim within time limited by orders in both the Receivership proceedings and the Reorganization proceedings, in both of which proceedings the District Court had exclusive jurisdiction of the Debtor's property. The door of the Court was open in the Reorganization proceedings until October 1941 for her to file or exhibit her claim therein,

but she waited until January 19, 1945, so to do. Sections 205 (c) (7) and 205 (c) (8), of Title 11, U. S. Code 1941, must be strictly enforced by this Court, as otherwise no railroad reorganization can ever be concluded.

III.

We assume that the opening two paragraphs under this heading of the petition for certiorari refer to Section 377, Title 28, U. S. Code 1941, but, as hereinabove noted, Section 347 (a) of Title 28 affords ample jurisdiction, and Section 347 (c) of Title 28 apparently prohibits the use of Section 377, Title 28, where Section 347 (a) of Title 28 is plainly applicable. As noted hereinabove in respect to *In re Macklem*, 28 F. (2d) 417, the jurisdiction of a District Court in Railway Reorganization proceedings is, by Section 77 of the Bankruptcy Act (Sec. 205 (a), 205 (c) (7) and (8), Title 11, U. S. Code 1941), exclusive as to all of the Debtor's property, wherever situated. The reference on page 12 of the petition for certiorari to "Justice Miller's dissenting opinion in *Peale v. Phipps*, 14 How. 368" is entirely an error. *Peale v. Phipps*, 14 How. 368, 14 L. Ed. 459, was an appeal from a U. S. District Court judgment rendered against a bank receiver who had been appointed by a Louisiana State Court. This Court reversed for want of jurisdiction of the District Court. There was no dissenting opinion, nor was there a Justice Miller then on the bench of this Court to have rendered any opinion therein.

The case of *In re Macklem* (supra) and the rules therein stated for ordinary bankruptcy proceedings—as to plenary suits and diversity of citizenship—simply do not apply to railroad reorganization proceedings.

We have shown hereinabove that the proceedings in the District Court were not summary. Even if they were, petitioner's own pleadings showed "that Plaintiff's case was without merit" as stated in the opinion by the Circuit Court of Appeals (Tr. 97).

We have also shown hereinabove that under the Florida decisions the right under the Florida Constitution to compensation for property taken for public purposes can be lost or abandoned, and this Court has repeatedly held that Federal constitutional rights can be waived.

F. RESPONDENTS' REPLY TO BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Having actually hereinabove answered the petition and pointed out its many unfounded conclusions of fact and law, to avoid repetition we will merely mention these errors as they are repeated in petitioner's brief, and try to confine ourselves to new matter or cases contained or discussed in the petitioner's brief.

We seriously doubt if the petitioner's brief complies with Rule 27, par. 1 (c), (d), (e) and (f) of the Rules of this Court. We do not know which one, if any of these required parts of a brief is intended to be covered by the petitioner's "Preamble", but we will also reply to the Preamble.

REPLY TO "PREAMBLE."

The District Court below did have "exclusive non-delegable control and jurisdiction" over the Debtor's property and all claims against the same filed or exhibited in the District Court. Section 205 (a), 205 (c) (7) (8), Title 11, U. S. Code. The proceeding in the District Court on petitioner's claim was not summary, and not without any evidence. The law applied by the District Court was in harmony with the applicable law of the State of Florida.

A comparison of the District Court's "Memorandum" (Tr. 31) with the opinion of the Circuit Court of Appeals (Tr. 89-97) will clearly show no different or new findings by the Circuit Court of Appeals—it merely stated the findings of the District Court in more detail. As the Circuit Court of Appeals had before it the entire record made in the District

Court on petitioner's claim, the Circuit Court of Appeals very properly examined the whole record in passing upon petitioner's very broad and vague "Statement of Points" (Tr. 39-41) in her appeal.

At all times from the inception of the Receivership proceedings September 1, 1931 until the commencement of the Reorganization proceedings February 1, 1941, the petitioner could have filed her claim or filed a petition for leave to sue in the Receivership proceedings, and the District Court having jurisdiction of the property of the Debtor had jurisdiction to grant or deny the claim, or grant or deny leave to sue thereon in the District Court, or even in an appropriate State court. *White v. Ewing*, 159 U. S. 36, 40 L. Ed. 67. Whether the District Court would have allowed the claim or granted leave to sue, if so presented in the Receivership proceedings, would have been a matter in the regulated discretion of that Court. *State of Texas v. Campbell*, (Cir. Ct. of App. 5th Cir. 1941), 120 F. (2d) 191; *Findlay v. Florida East Coast Railway Co.* (U. S. Dist. Ct. S. D. Fla. 1933) 3 Fed. Supp. 393, and as affirmed by Circuit Court of Appeals 5th Circuit 68 F. (2d) 540, text 542-43; *Jordan v. Wells* (Cir. Ct. N. D. Ga. 1878), 3 Woods 527, 13 Fed. Cases, p. 1111. See also 45 *Amer. Juris.* Sec. 460, and 53 *Corpus Juris*, Receivers, p. 338.

On and at all times after February 1, 1941, when the District Court granted a creditor's petition for the reorganization of Florida East Coast Railway Company under Section 77 of the Bankruptcy Act (Sec. 205 Title 11, U. S. Code), the District Court had exclusive non-delegable control over the administration of the (Railway Debtor's property) "estate in its possession". *Thompson v. Magnolia Petroleum Co*, 309 U. S. 478, 84 L. Ed. 876. Petitioner was, after February 1, 1941, confined to the Reorganization proceedings and could not elsewhere prosecute her claim. The District Court promptly heard her claim when presented in the Reorganization proceedings. As this Court has repeatedly upheld Section 77 of the Bankruptcy Act, all of petitioner's asserted rights under the Florida Constitution necessarily

were subject to the higher law of this land—Art. I, Sec. 8, Cl. 4, of the United States Constitution and the Act of Congress thereunder—Section 77 of the Bankruptcy Act. (Sec. 205, Title 11, U. S. Code).

The title of Florida East Coast Railway Company to certain lands in the Hanson Grant in Martin County, Florida, questioned by petitioner, did not involve any peculiar unsettled point of Florida law authorizing the District Court to grant leave to litigate the point in a state court of Florida, as was decided to be appropriate under such circumstances, by this Court, in *Thompson v. Magnolia Pet. Co.* (supra). As a matter of record herein the Railway Debtor's title or claim of title was based upon the 1901 final decree in partition of the District Court below (Tr. 11-15, 31-32, & 89-97). The essential question of fact and law relating to the Debtor's title to its right of way was what was the width of the right of way acquired under the 1901 partition decree which did not state the width. Both courts below on the evidence of the two plats, copies of which were tendered by the petitioner with her petition for leave to sue, held the width to be 100 feet. Both courts also had the benefit of copies of additional recorded plats made by petitioner's predecessor in title, the Land Company, and both courts also had evidence adduced by these respondents as to right of way monuments and pole lines in 1915 on both edges of the 100-foot right of way. However, petitioner's own exhibits, the two plats and the 1901 final decree in the partition suit, were ample for the District Court and the Circuit Court of Appeal to determine (as they did) that the Debtor's title was good and that petitioner and her predecessor, Land Company, never had or acquired any title to any part of the 100-foot right of way in question, and therefore could have no lien on the same.

We have hereinabove quoted from *Hillsborough County v. Kensett*, 107 Fla. 237, 144 So. 393, holding that a claim for compensation for land taken for public purposes can be "lost or abandoned". Those words are in the opinion, and all of the general argument of petitioner to the contrary cannot alter that fact or the law of Florida as so established.

We will hereafter show that by the great weight of decisions and text authorities corporations clothed with the power of eminent domain can acquire good title to land by adverse possession. These two principles are plainly also supported by *Florida Sou. R. Co. v. Loring* (Cir. Ct. of App. 5th Cir. 1892), 51 Fed. 932, and *Seaboard Air Line Railway v. Atlantic Coast Line Railroad Co.*, 117 Fla. 810, 158 So. 459.

QUESTIONS PRESENTED.

Argument of First Question

"Can the Federal District Court Dispose of a Bona Fide Contested Claim by a Summary Proceeding in Bankruptcy on an Application for Leave to Sue?"

The proceeding in the District Court was not summary, nor was jurisdiction of the property of Florida East Coast Railway Company acquired in 1931 by the District Court under Section 205, Title 11 of the U. S. Code. The 1931 jurisdiction was acquired on a bill of a general creditor and in May 1932 on a bill of a Mortgage Trustee. *White v. Ewing*, 159 U. S. 36, 40 L. Ed. 67, is a sufficient answer to any contention that the District Court did not obtain full jurisdiction in such railway receivership proceedings of all of the property of Florida East Coast Railway Company, and also jurisdiction to determine in its discretion all controversies and claims concerning such property, irrespective of citizenship of the claimants. In 1887 Congress relaxed the prior strict rule and enacted what is now Section 125 (formerly Section 66), Title 28, Judicial Code and Judiciary U. S. Code 1941, permitting Federal Court Receivers to be sued "in respect to any act or transaction of his in carrying on the business connected with such property, without previous leave of the court in which such receiver or manager was appointed." The substance or equivalent of this statute was incorporated into Section 77 of the Bankruptcy Act. See Section 205 (j), Title 11, Bankruptcy, U. S. Code. The present proceeding is not one growing out of the operation or administration of the properties by the Receivers (1931

to 1941) or Trustees (1941 to date); it is an attempt to impress a lien upon property, previously in the custody of the Receivers and now vested in the Trustees, arising out of actions of the corporation prior to 1931. It is an attempt to impress a lien upon *res*, the possession and title of which is now vested in the Trustees under bankruptcy proceedings.

Conceding (but not admitting) that the District Court disposed of the petition for leave to sue in a summary proceeding, and that the District Court could have properly applied general equity receivership procedure and, if the petition for leave to sue were otherwise proper, granted the same, we say that the petition did not, by far, meet the fundamentals of such equity procedure, and was properly denied by the District Court under the following authorities:

Volume 53, *Corpus Juris*—Receivers, at page 338, in respect to leave to sue, says:

> "(§ 552) b. Granting Leave or Disposing of Controversy—(1) Proceedings in General. The application for leave to sue a receiver should be made to the court which appointed him, and the petition should, on its face, show that the petitioner has a case. The court should not allow its receiver to be harassed by a suit where, according to his own showing, the petitioner has no cause of action. The application is in effect a motion in the cause, of which the receiver should have notice, and, it has been held, cannot be granted in any other cause than that in which the receivership is pending."

In *Durand & Co. v. Howard & Co.*, (Circuit Court of Appeals, Second Circuit, July 1914), 216 Federal Reporter 585, L.R.A. 1915 B, page 998, the Court said:

> "It is generally considered to be a matter within the discretion of the court whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere." Citing and quoting extensively from *Porter v. Sabin*, 149 U. S. 473, 37 L. Ed. 815; and further stating:
>
> "In refusing its consent to allow a suit to be brought in the state courts the court had all the facts before it,

and it came to the conclusion that the right which the landlords seek to enforce against the receivers did not exist. When a court can see from the facts stated that the so-called right is not a right, it is not even called upon to exercise its discretion and determine whether or not it will permit a suit to be brought in another court against its receivers, thereby exposing them to the costs of a needless and fruitless litigation at the expense of the creditors."

216 Fed. Rep. 585, 588, 589.

In *Findlay v. Florida East Coast Ry Co.*, (U. S. Dist. Ct. Sou. Dist. Fla., April 1933), 3 Fed. Supp. 393, the District Court denied leave to sue the Receivers of Florida East Coast Railway Company because:

"Without the presence in this suit of the above-named defendants, no useful purpose can be served by permitting the court's receivers, appointed in the consolidated equity cause, to be joined as parties defendant herein. To permit their joinder, and require them to litigate herein in this state of the case, would subject the receivership estate to unnecessary and futile expense. An order, therefore, will be entered in the consolidated receivership cause denying leave to join the receivers herein. Jordan v. Wells, 13 Fed. Cas. page 1111, No. 7525."

The decision of the District Court was expressly affirmed by the Circuit Court of Appeals for the Fifth Circuit on January 24, 1934, under the same name, 68 F. (2d) 540; certiorari denied under same title in 292 U. S. 623, 78 L. Ed. 1478. In the concluding portion of Judge Hutcheson's opinion it is stated:

"From these views it follows that the suit was not maintainable; that Kenan and Haines, and the trustees in the mortgage, were properly absolved from answering in it; that the court was right in declining to permit the vain thing of having the receivers appear in a cause which could not be maintained, and that he was right in dismissing the bill.

"The judgment is affirmed."

68 F. (2d) 540, text 542-543. Cert. denied 292 U. S. 623, 78 L. Ed. 1478.

In *Jordan v. Wells*, 3 Woods, 527, (Circuit Court, N. D. Georgia, March 1878), 13 Fed. Cas. page 1111, in his opinion therein Circuit Judge Woods said:

> " . . . it is essential that the petition should, on its face, show that the petitioner has a case. The court should not allow its receiver to be harassed by a suit where, according to his own showing the plaintiff has no cause of action. Do the facts set out in this petition show that the petitioner has a case against the receiver on which he ought to recover? * * * * the petitioner does not make out a *prima facie* case, and his petition for leave to sue the receiver must be denied."

Bearing in mind:

(a) The difference between Federal Court railway receiverships, which involve the public welfare, and ordinary receiverships;

(b) The 1887 Act of Congress permitting such receivers to be sued without leave of court, in respect to their operation of the receivership estate, but not authorizing actions involving the *res* in the possession of the Receivers; and

(c) The statutory jurisdiction of the Federal Court in proceedings for the reorganization of a railroad under Section 77 of the Bankruptcy Act, there is no real conflict among the several Federal District and Circuit Courts of Appeal, nor between them and state courts, as to suits against receivers or trustees, with or without leave of the court appointing them. All of the cases cited by petitioner can readily be harmonized or distinguished.

Argument of Second and Third Questions

"Can a Federal District Court Claim That Because a Corporation That Is Organized Under the Laws of the State in Which That Court Sits and Is Adjudged a Bankrupt by That Court, Extend Its Jurisdiction to Hear and Determine Matters of Law and Fact That Except of the Bankruptcy Proceedings

> are Within the Sole Jurisdiction of the State Circuit Court and the Venue is in the County Where the Land in Question is Situated?"

It will be noted that in combining on page 25 of her brief her second and third questions separately stated on page 8 of the petition for writ of certiorari petitioner has cured most of the erroneous assumptions in the separately stated second and third questions. The answer to this combination of the second and third questions is plainly no. Sections 205 (a) and 205 (c) (7) and (8), of Title 11, Bankruptcy, U. S. Code 1941, conferred upon the District Court exclusive jurisdiction of the property of the Debtor herein, wherever situated, and of all claims thereto filed or exhibited in such Reorganization proceedings. As the requisite order fixing time for filing claims (Tr. 43) and notice thereof were duly entered or given in the proceedings below, it is therefore unnecessary to discuss in much detail the several cases cited by petitioner under this heading. We have heretofore stated most of the Florida law on the doctrine of laches. We did make a statement, in substance, that under the law of Florida the doctrine of laches does not closely follow for the time element the statute of limitations.

> "There is no rule defining what lapse of time will bar a purely equitable demand. Each case must depend upon its circumstances."
>
> 6th syllabus by court, *Amos v. Campbell*, 9 Fla. 187.

Amos v. Campbell (supra) was cited with approval by the Florida Supreme Court in *Cone Brothers Construction Co. v. Moore* (decided in 1940), 141 Fla. 420, 193 So. 288.

If petitioner had a claim, it was not a legal claim but an equitable one for the value of land taken by a public corporation having, but failing to exercise, the power of eminent domain. There is no statute of Florida creating a lien under such circumstances. The lien is one created by the Florida chancery courts to fit the situation. The earliest case declaring such a lien is *Florida Southern R. Co. v. Hill*, 40 Fla.

1, 23 So. 566. In *Special Tax School District v. Hillman*, 131 Fla. 725, 179 So. 805, the court declared a lien for the value of land purchased for public school purposes, but for the purchase price of which invalid notes and an invalid mortgage had been given. On the authority of its prior decision of *Shaylor v. Cloud*, 63 Fla. 608, 57 So. 666, the court, in *Special Tax School District v. Hillman* (supra), held that the lien so created by it would be barred in equity at the same time that the "remedy at law for recovery of the unpaid part of the purchase price of the land is barred by the statute of limitations"; also that the Florida statute of limitation of three years applied to the school land transaction, but that the three years had not in fact run. Therefore, accepting petitioner's own contention that the Debtor Railway tortiously entered upon her land in 1926, her equitable lien was, under the Florida law, barred in three years, or at the end of 1929, and therefore at least eighteen months before petitioner was enjoined from suing in the state court by the Receivership proceedings commenced in the District Court September 1, 1931. However, petitioner actually was barred by the Florida seven year statute of limitation:

> "95.12 Real Actions; limitations generally.—No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within seven years before the commencement of such action."
>
> Section 95.12 Florida Statutes 1941.

because the evidence showed, as found by the District Court (Tr. 30), that as early as 1915 the Railway Debtor's possession and use of a 100-foot in width right of way was evidenced by right of way monuments and telegraph pole lines. The Florida seven year statute of limitation had actually run twice in succession between 1915 and September 1, 1931, when the Receivership proceedings were commenced in the District Court.

Argument of Fourth Question

'If the District Court Was Wrong in Assuming Jurisdiction and in the Rendition of Its Judgments, Was the Circuit Court of Appeals in Error in Not Only Affirming the Lower Court But Also Making Added Findings of Fact That the Land Was in Adverse Possession of the Railway When the Land Company Executed and Delivered Its Contract and Deed?"

The District Court could not have been wrong in assuming jurisdiction because, as stated many times hereinabove, it had exclusive jurisdiction of the Debtor's property and all claims thereupon filed in the Reorganization proceeding shown in the record, and pursuant to Sections 205 (a) and 205 (c) (7) and (8), Title 11, Bankruptcy, U. S. Code 1941. We have also shown hereinabove that the proceeding was not summary. The District Court in its order denying petition for leave to sue entered the order (Tr. 30) "after due notice, having heard the evidence of the parties, and the argument of their counsel". Petitioner is mistaken as to a pole line being only on the east side of the tracks. The Postal Company's standard telegraph pole line with cross arms "according to Debtor's records, overhung and yet overhangs the west right of way line of the aforesaid 100 foot in width right of way" (Tr. 17); also a "1915 survey of the Debtor's property shows that there were eighteen (18) right of way monuments (Nine (9) on each side) at distances of 49.5' and 50' from the center line of the then main track of the Debtor through the north half of the said Hanson Grant." Seventeen of these eighteen right of way monuments were shown on an I.C.C. Bureau of Valuation survey made in 1916. Ten of the original right of way monuments, being seven on the west side (towards petitioner's land) and three on the east right of way line, were in place the latter part of 1944. (Tr. 15, 16). The Debtor did rely upon the final decree of December 17, 1901, in the partition suit, as well as upon the two sets of plats filed by petitioner's predecessor in title, the Land Company (Tr. 18). These facts appeared from the

Trustees' Report to the Court upon the petition for leave to sue. They were in no way denied by petitioner.

Argument of Fifth Question

> "If the Federal and State Constitutions Forbid Taking Private Property for Public Use Without Payment, Can a Corporation with the Right of Eminent Domain Proceed by Indirection and Acquire Such Property by Any Other Method?"

In addition to *Hillsborough County v. Kensett*, 107 Fla. 237, 144 So. 393, wherein the Florida Supreme Court held that right to compensation for land taken for public purposes can be "lost or abandoned", the Florida Supreme Court has expressly held that one railroad in Florida can acquire by adverse possession the land of another Florida railroad. See *Seaboard Air Line Railway Co. v. Atlantic Coast Line Railroad*, 117 Fla. 810, 158 So. 459. The standard text authorities on eminent domain all hold that:

> "According to the weight of authority the fact that a corporation is endowered with the power to take land under the power of eminent domain on making just compensation therefor does not prevent it from acquiring title by adverse possession."
>
> Vol. 2, *Corpus Juris*—Adverse Possession, 229.

To the same effect, see:

Vol. 1, *American Jurisprudence*—Adverse Possession, Section 27, page 806.

Vol. 2, *Nichols on Eminent Domain* (2nd Edition), Section 344, pages 959 and 960.

Vol. 2, *Lewis Eminent Domain* (Third Edition), Section 967, page 1714, and

Case note "Right of Corporation to Acquire Title by Adverse Possession" in *Annotated Cases* 1915C, page 772.

These authorities state that the minority view is followed only by North Carolina and Pennsylvania. Of course this

minority holding does not violate any rights under the Federal Constitution because this Court has held:

> "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute."
>
> *Pierce v. Somerset Railway*, 171 U. S. 641, 43 L. Ed. 316.

Because of the insistence of petitioner in her petition and brief that constitutional rights cannot be waived or barred by statutes of limitation, we cite to this Court *Bostwick v. Baldwin Drainage District* (Circuit Court of Appeals, Fifth Circuit, November 1945), 152 F. (2d) 1, (Cert. denied ——U. S. ——, 90 L. Ed. 764). Therein Circuit Judge Lee said:

> "The right claimed to be protected by the Fourteenth Amendment was violated, if it was infringed at all, by the other acts and omissions of which appellants complain. The acquiescence which estopped them to enforce their particular rights likewise operated as a waiver of the general right to enforce due process."

Petitioner cites *Northern Pacific Railway Co. v. Concannon*, 239 U. S. 382, 60 L. Ed. 342, but there this Court merely held that a particular railroad right of way granted to the railroad by Act of Congress could not be lost to the railroad by adverse possession by private individuals. There is no intimation in the opinion of this Court that the converse is true, and this Court had no occasion to and did not hold that a railroad could not acquire right of way by adverse possession. The same holding, under practically the same facts except it was a state grant, was made by the Florida Supreme Court in *Seaboard Air Line Railway Co. v. Special R. & B. Dist.*, 91 Fla. 612, 108 So. 689. In that case the court dealt solely with the acquisition of title to land by adverse possession as against a railroad holding the same under a state grant.

Petitioner attempts to construe the 1913 plat of predecessor Land Company, copy of which was attached to her petition for leave to sue (Tr. 10), merely as an offer of dedication of the 100-foot railway right of way shown thereon. But peti-

tioner has admitted that the Debtor Railway obtained title under the 1901 final decree in the partition suit to some width of right of way at this exact location (Pet. for Cert. p. 4). Petitioner is therefore contending that her predecessor Land Company, by its 1913 plat, offered for dedication the Railway's original 1901 partition decree right of way as well as additional land up to a total width of 100 feet. The absurdity of such contention is apparent on its face. A land company does not offer for dedication land that it does not own. If it had done so it would have been slandering the title acquired by the Railway (for some width, if not the 100 feet) under the 1901 final decree.

Argument of Sixth Question

"Was the Respondent Guilty of Padding the Record on Appeal?"

We have shown several times hereinabove that the District Court had "exclusive non-delegable control" (*Thompson v. Magnolia Petroleum Co. supra*) of the administration of the Debtor's estate in this proceeding for the Reorganization of a Railroad under the Bankruptcy Act amendment. We have also shown that there was no novel point of state law to be decided warranting the Court, for the convenience of the parties, in referring the parties to a state court for decision on an undecided point of state law (*Thompson v. Magnolia Petroleum Co. supra*). It was, therefore, the duty of the District Court to determine petitioner's claim. We have also shown that the Court did not proceed in a summary manner. Even assuming that the District Court did act in a summary manner (which is not shown by the record), as was clearly stated by the Circuit Court of Appeals in its opinion: "We think that if none of these extrinsic documents put in evidence by appellees had been received, it would nevertheless have clearly appeared that the plaintiff's case was without merit and that the lower Court did not abuse its discretion in denying plaintiff the right to sue." (Tr. 97, and see report of such decision in 154 F. (2d) 963). On this same point see also the cases of *Durand & Co. v.*

Howard & Co. (C.C.A. 2nd Cir. 1914), 216 Fed. Rep. 585, L.R.A. 1915B, page 998; *Findlay v. Florida East Coast Railway Co.* in the District Court as well as the Circuit Court of Appeals (*supra*); *Jordan v. Wells* (*supra*); and Vol. 53 *Corpus Juris*—Receivers, page 338, which we have hereinabove discussed.

As a matter of fact, nearly all of the record from the District Court to the Circuit Court of Appeals, which petitioner claims was padded, went to the Circuit Court of Appeals upon the express order of the District Court (Tr. 81). Therefore petitioner's complaint as to the size of the record is against an action of the District Court and not the respondent's, and it will be noted from the record that petitioner did not complain in the Circuit Court of Appeals about the order of the District Court correcting the record on appeal (Tr. 81).

We feel that we have already answered, somewhat at length, the five reasons for granting certiorari of the petitioner on page 40 of her brief.

We respectfully submit that petition for certiorari should be denied.

RUSSELL L. FRINK,
P. O. Box 1259,
Jacksonville 1, Florida,
Attorney for Respondents.

Of Counsel:
JOHN B. L'ENGLE,
P. O. Box 1259,
Jacksonville 1, Florida.